No. 01-846

IN THE

Supreme Court of the United States

GRACIE COOK and LITTLETON COOK,

Petitioners,

v.

HUGHES TRAINING, INC., HUGHES ELECTRONICS CORPORATION, and RAYTHEON COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER AN ARBITRATION AGREEMENT THAT INCLUDES A STANDARD OF REVIEW FOR ARBITRATION AWARDS IS ENFORCEABLE ACCORDING TO ITS TERMS.

II. WHETHER, AS A MATTER OF CONTRACT CONSTRUCTION, AN ARBITRATION AGREEMENT THAT INCORPORATES BY REFERENCE ARBITRATION PROCEDURES SET FORTH IN A SEPARATE DOCUMENT IS UNAMBIGUOUS.

III. WHETHER, UNDER TEXAS LAW, AN ARBITRATION AGREEMENT CONTAINING A STANDARD OF REVIEW FOR ARBITRATION AWARDS IS NOT UNCONSCIONABLE WHERE THE APPELLATE STANDARD IS EQUALLY AVAILABLE TO BOTH THE EMPLOYEE AND THE EMPLOYER.

IV. WHETHER, ON THESE FACTS, THE DISTRICT COURT WAS CORRECT IN SETTING ASIDE THE ARBITRATOR'S AWARD BECAUSE THE EMPLOYER'S CONDUCT WAS NOT "EXTREME OR OUTRAGEOUS" AS A MATTER OF LAW.

STATEMENT PURSUANT TO RULE 29.6

Corporate Respondents

Hughes Training, Inc.
Hughes Electronics Corporation
Raytheon Company

In 1997, Hughes Electronics Corporation merged its defense business into Raytheon Company, and Hughes Training, Inc., merged into Raytheon in 1998. Accordingly, Raytheon Company is the successor-in-interest to both Hughes Training, Inc., and Hughes Electronics Corporation. Raytheon Company has no parent company holding more than 10% of its stock.

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Respondents respectfully request that the Court deny the petition for writ of certiorari. The lower court examined the parties' arbitration agreement and reviewed the arbitrator's findings of fact and conclusions of law in accordance with the standard of review contracted for by the parties in their arbitration agreement. In doing so, the lower court acted squarely in accord with precedent from this Court and other courts of appeal.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 254 F.3d 588 and is reprinted at page 1a of the Appendix to the Petition for Writ of Certiorari.

The decision of the United States District Court for the Northern District of Texas is reported at 148 F. Supp.2d 737 (Judge Eldon B. Mahon presiding) and is reprinted at page 13a of the Appendix.

The opinion of the arbitrator in the matter of Gracie Cook and *Littleton Cook v. Hughes Training, Inc., et al.*, which underlies Petitioners' appeal, is reprinted at page 26a of the Appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to section 1254 of Title 28 of the United States Code which governs appeals of decisions of federal courts of appeal. *See* 28 U.S.C. § 1254 (West 1993).

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 29, 2001. The jurisdiction of the Court of Appeals was premised upon section 1291 of Title 28 of the United States Code which concerns appeals from final decisions of district courts. *See* 28 U.S.C. § 1291 (West 1993).

The final decision from the United States District Court was entered on October 23, 2000. The district court had diversity jurisdiction pursuant to section 1332(a) of Title 28 of the United States Code. *See* 28 U.S.C. § 1332(a).

STATUTES INVOLVED

Section 2 of the Federal Arbitration Act (the "FAA"), codified at 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 10 of the FAA, codified at 9 U.S.C. § 10, provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was

made may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there is evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other behavior by which the rights of any party have been prejudiced.

(4) Where the arbitrator exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

COUNTERSTATEMENT OF THE CASE

Gracie Cook is a former employee of Hughes Training, Inc. (referred to as "Raytheon").[1] When Cook was first hired in 1993, she executed a contract entitled "Mutual Agreement to Arbitrate Claims" (referred to as the "Arbitration Agreement"). This Arbitration Agreement provided that all employment disputes would be submitted to final and binding arbitration. The Arbitration Agreement further stated that "Arbitration under [the] Agreement may be compelled and enforced according to the FAA (9 U.S.C. § 1 *et seq.*) and shall be conducted in accordance with the EPRP [the Employee Problem Resolution Procedure] Arbitration Procedure, which is incorporated herein by reference."

The Employee Problem Resolution Procedure (the "EPRP") contained the following provision relating to an appeal from an arbitration award:

> Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement, to enforce an arbitration award, and to vacate an arbitration award. However, in actions seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.

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1. Hughes Training, Inc. and Hughes Electronics Corporation are companies affiliated with Hughes Aircraft Company (the party to the Arbitration Agreement) and, by the terms of the agreement, both are bound thereunder.

By signing the document, Cook acknowledged that she had read both the Arbitration Agreement and the EPRP.

In 1995, Cook was transferred to the database engineering department at Raytheon under the supervision of Mike Braudaway. The database engineering department is responsible for creating geocells, using computer simulation, that reflect the topography of the various countries to whom Raytheon sold its simulators. The department worked under strict time and budgetary demands for which Braudaway was responsible.

Almost from the beginning, Cook struggled to comply with the budgetary and time constraints of the job. In an effort to improve Cook's performance, Braudaway provided additional training for Cook and paired her with Carmen Bernal (a stronger, more efficient employee) to assist Cook in her production and to increase her awareness of her performance problems. However, despite these efforts, Cook's performance improved only marginally in that her work was inconsistent and her error rates remained high.

Following a meeting on May 6, 1996, Braudaway informed Cook in writing that she would have until May 31, 1996 to improve her database development skills. On that date, Raytheon would evaluate her work, and, if her skills did not improve, Raytheon would take further action which could include termination. In response, Ms. Cook accused Braudaway of discrimination.[2]

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2. In their Statement of the Case, Petitioners spend several pages detailing facts and opinions concerning allegations of discrimination and retaliation which are not part of this case. (*Petition* at 6-8). At the arbitration hearing, Cook abandoned her race discrimination

(Cont'd)

About this same time, Mr. Braudaway constructed a "test bed" evaluation for Cook to complete within a specified period of time without the help of her coworkers. Within a few days of the test bed assignment, Cook met with Braudaway and Melanie Dively, the Human Resources Manager. Cook became upset at the meeting. She began to cry, stutter, and rub her arm. Braudaway offered to call Cook's doctor, but she refused. Cook left the meeting and went to her doctor.

Following the doctor's visit, Cook reported to Raytheon she had suffered from a series of "mini-strokes." She briefly returned to work on May 17, 1996, but soon after took a three month medical leave of absence. She did not return to Raytheon until early August 1996.

At Cook's insistence, her doctor permitted her to return to work on August 5, 1996 – ten days before his initial authorization date. The doctor's written note indicated that Cook could return to work with no restrictions. Consequently, when Cook reported back to work on August 5, Braudaway returned her to her normal work routine, which included the test bed evaluation. When Ms. Cook learned that she would be required to resume the test bed evaluation, she told Braudaway that, despite her doctor's full release, she could

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(Cont'd)
claims, leaving only her claims for retaliation and intentional infliction of emotional distress and Mr. Cook's claim for loss of consortium. In her award, the arbitrator found Cook's retaliation claim was meritless. Respondents therefore take exception to the inclusion of each and every reference to perceived discrimination and retaliation, including all references to a "good old boy" environment or the inference that Braudaway created the test cell evaluation in retaliation for Cook's protests of discrimination.

not perform at the same level. She began to cry and later alleged to have had a "seizure" during her meeting with Braudaway. After Ms. Cook calmed down and regained her composure, Braudaway suggested that, if she felt that she could not do the work, she should either contact the human resources department about transferring into another position or consult with her physician about modifying her restrictions. Later that week, Cook voluntarily left work at Raytheon.

In April 1998, Cook filed suit alleging intentional infliction of emotional distress in connection with the end of her employment at Raytheon. In 1999, Cook added both state and federal claims for race discrimination and retaliation. Her husband, Littleton Cook, filed a claim for loss of consortium. Raytheon compelled arbitration, and the parties submitted all claims to the arbitrator for resolution.

The arbitrator issued an opinion (the "Arbitration Award") finding in favor of Raytheon on the retaliation claim (Cook had dropped her claim for discrimination), but awarding $200,000 to Gracie Cook on the intentional infliction of emotional distress claim and $25,000 to Littleton Cook on the loss of consortium claim. Raytheon filed a motion to vacate the arbitrator's decision in federal district court. Raytheon argued that, under the judicial standard of review agreed upon by the parties, the evidence did not support a finding that Raytheon intentionally inflicted emotional distress. The Cooks argued, as they do here, that the standard of review incorporated in the Arbitration Agreement was inconsistent with the agreement itself and unconscionable in light of the parties' respective bargaining positions. Alternatively, they argued that the evidence supported the claim for intentional infliction of emotional

distress. The district court issued an order vacating the arbitrator's award. The court concluded that the parties lawfully contracted for a more expansive standard of review, and that the decision to return Ms. Cook to the test bed evaluation was not extreme or outrageous conduct. The court further concluded that Cook failed to establish her claim for intentional infliction of emotional distress and that Littleton Cook's derivative claim for loss of consortium must likewise fail. The Cooks appealed to the Fifth Circuit, which affirmed the district court's opinion.

REASONS FOR DENYING THE WRIT

The issues presented by this case boil down to basic contract interpretation. Under the FAA and the directives of this Court, arbitration agreements must be interpreted in accordance with the agreement's terms and the parties' intentions. Here, Petitioners seek to avoid an unambiguous term of their contract which modifies the FAA's default standard of review for arbitration awards. Because this Court has repeatedly emphasized that that parties are free to structure their arbitration agreements as they see fit, the district court and the Fifth Circuit correctly construed the contract to enforce the standard of review bargained-for by the parties.

In a transparent attempt to grab this Court's attention, Petitioners state that the Fifth Circuit's opinion in this case is "in conflict with the United States Courts of Appeal for the Seventh Circuit and Tenth Circuit" regarding whether parties to an arbitration agreement may contractually modify the standard of review of an award. *Petition* at 11. However, Petitioners have overstated their position. What Petitioners fail to state is that the Seventh Circuit has yet to address the

very issue they present to this Court for consideration and that the Tenth Circuit opinion is a recent anomaly that has yet to be interpreted by other circuits. Moreover, as demonstrated below, the lower court and appellate decisions rest squarely upon Supreme Court precedent and earlier case law from the Fifth Circuit. Even if the Court were to disagree and be inclined to weigh in on the purported "conflict," the district court's decision vacating the arbitration award must still stand because the arbitrator's ruling was in "manifest disregard of the law."

I. The Fifth Circuit's ruling squarely rests on Supreme Court precedent and is in line with the majority of other circuits that have addressed this issue.

Decisions from this Court make it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate in accordance with the agreement's terms. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (noting that "the FAA compels judicial enforcement of a wide range of arbitration agreements."). Because arbitration is simply a matter of contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Indeed, the FAA "does not operate without regard to the wishes of the contracting parties." *Mastrobuono*, 514 U.S. at 57. Thus, if parties contract to arbitrate pursuant to rules or procedures different than those provided for in the FAA, Congressional intent underlying the FAA is nonetheless satisfied so long as the parties' agreement is enforced.

See Volt, 489 U.S. at 478 (holding that the FAA permits parties to "specify by contract the rules under which . . . arbitration will be conducted.").

The Fifth Circuit first held that parties may contractually fashion their own standards of review of an arbitration decision in *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995). Since that time, very few courts have had to weigh in on the issue. However, of those few that have, virtually all hold that parties may contractually modify the FAA's standard of review. *See, e.g.*, *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 292-93 (3d Cir. 2001) *cert. denied*, 122 S. Ct. 545 (Nov. 13, 2001); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245 at *6-7 (4th Cir., Aug. 11, 1997); *M & L PowerServs., Inc. v. American Networks Int'l*, 44 F. Supp.2d 134, 151 (D.R.I. 1999); *New England Util. v. Hydro-Quebec*, 10 F. Supp.2d 53, 63 (D. Mass 1998); *Flexible Mfg. Sys. v. Super Prods. Corp.*, 874 F. Supp. 247, 248-49 (E.D. Wis. 1994); *Flight Sys. v. Paul A. Laurence Co.*, 715 F. Supp. 1125, 1127-28 (D.D.C. 1989). Accordingly, the Fifth Circuit's ruling in the instant case is not only in line with the directives from this Court, but also consistent with its earlier *Gateway* decision and with the greater weight of authority on this issue.[3]

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3. This Court recently denied certiorari in a case involving this same issue. *See Kayser v. Roadway Package System, Inc.*, 122 S. Ct. 545 (Nov. 13, 2001). In *Kayser*, the parties' arbitration agreement contained a generic choice-of-law clause stating that any judicial review of the arbitrator's award would be conducted pursuant to Pennsylvania law. The parties disputed whether the clause contractually modified the FAA's standard of review. The Third (Cont'd)

As the primary basis for their petition for writ of certiorari, Petitioners cite to two other circuits which they claim disagree with the Fifth Circuit on the issue of whether, as part of the arbitration agreement, parties may contractually expand judicial review of an arbitrator's award. (*Petition* at 12). However, Petitioners overstate their case.

A. There is no "conflict" between the Fifth and Seventh Circuits because the Seventh Circuit has yet to address the merits of the issue.

The first opinion Petitioners point to as evidence of a conflict in the circuit courts is *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991). (*Petition* at 12). In *Chicago Typographical Union*, a panel of the Seventh Circuit considered an arbitration agreement which did not contain a provision for expanding judicial review of the award. In fact, the dispute in *Chicago Typographical Union* centered upon alleged violations of an agreement to arbitrate a labor dispute by one of the parties. *See id.* at 1503-05. The level of judicial scrutiny of the arbitration award was never at issue. Indeed, the court evaluated the arbitrator's decision without reference to any

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Circuit held that, although the FAA permits parties to contract for vacatur standards other than those provided by the FAA, a generic choice-of-law clause did not manifest a clear intent by the parties to abandon the FAA standards. *See Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 297 (3d Cir. 2001). Although Kayser's appeal to this Court concerned only whether a generic choice-of-law provision incorporating state law is sufficient to opt out of the FAA's standard of review, this issue was intertwined with the permissibility of the parties to contractually modify the judicial review of an award as a threshold inquiry.

contractually conferred standard of review. Consequently, Petitioners' reliance upon any language from the Seventh Circuit's opinion in *Chicago Typographical Union* as evidence of a "conflict" with the Fifth Circuit's ruling (*Petition* at 12) is clearly misguided. Any passing advisory reference from the opinion as to the parties' rights to expand the judicial review of an arbitration award is in a completely different context. Even a cursory review of the Seventh Circuit's opinion reveals that it does not contain any probing on-point analysis of the FAA. Simply stated, Petitioners have put words in the mouth of the Seventh Circuit in an effort to create a basis for this Court's jurisdiction.

B. The Tenth Circuit's opinion in *Bowen v. Amoco Pipeline Co.* is a recent anomaly.

The second opinion Petitioners cite as the basis of their conflict in the circuits argument is *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001). In *Bowen*, the Tenth Circuit concluded that parties may not contract for a standard of review different than the standard provided by the FAA. *See id.* at 936. In so doing, a single panel of the Tenth Circuit was the first to hold that parties may not contractually modify the standard of review of an arbitration award.[4] While it

4. The *Bowen* opinion was handed down by a single panel of the Tenth Circuit, which included one visiting judge sitting by assignment. Indeed, additional study and review by the entire Tenth Circuit may have yielded a different outcome or, at a minimum, provided a concurrence or dissent for this Court's benefit. On the other hand, the Fifth Circuit's ruling in the instant case, while not en banc, does follow earlier precedent from a different Fifth Circuit panel. *Compare Gateway Tech., Inc.*, 64 F.3d at 997 *with Hughes Training Inc.*, 254 F.3d at 593. The fact that the issue Petitioners present was subjected to only a single-panel review highlights the need for further study and resolution within the circuit courts, as addressed later in this section.

seemingly appears that the Fifth and Tenth Circuit rulings are incompatible, the Court should nonetheless decline to exercise its jurisdiction. The issue presented, although important, is not yet suitable for resolution by this Court.

First, the *Bowen* decision cited by Petitioners does not comport with the underlying purposes of the FAA and is contrary to precedent from this Court. Nothing in the FAA prohibits parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review of the award. Moreover, as stated above, earlier decisions from this Court make it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate in accordance with the agreement's terms. *See Volt Information Sciences, Inc.*, 489 U.S. at 478-79; *Mastrobuono*, 514 U.S. at 57; *First Options of Chicago, Inc.*, 514 U.S. at 943. By refusing to honor the standard of review bargained for by the parties in *Bowen*, the Tenth Circuit deviated from the directives of this Court concerning deference to the parties' intentions, and its ruling frustrates the purpose of the FAA. In short, *Bowen* was wrongly decided.

Second, the *Bowen* decision is so recent that there has not been time for other courts to further address the Tenth Circuit's error and provide thoughtful and constructive study for this Court's illumination. Indeed, the Tenth Circuit handed down its decision just a few days before the Fifth Circuit issued its ruling in the instant case. Importantly, neither the Fifth Circuit nor any other court has considered or addressed the reasoning relied upon by the Tenth Circuit in support of its ruling. Similarly, the Tenth Circuit has yet to consider the Fifth Circuit's ruling in this case or conduct an en banc review of the issue. At the present time, the Tenth Circuit's *Bowen* opinion stands alone as an aberration.

II. There is no error below warranting review.

The balance of the issues presented by Petitioners in an attempt to persuade the Court to exercise jurisdiction involve correcting what they perceive to be errors of law. The Court should disregard these grounds for two reasons. First, the district court correctly decided the substantive issues. Second, the questions presented do not have far-reaching implications to warrant the exercise of this Court's judicial resources.

A. The district court correctly construed the parties' unambiguous Arbitration Agreement.

Petitioners' ambiguity argument is premised upon a constrained construction of the Arbitration Agreement. First they contend that, because the Arbitration Agreement states that awards will be "final" and "binding," any provision in the Arbitration Agreement indicating that the award may be appealed gives rise to an ambiguity. (*Petition* at 14-15). Second, Petitioners contend that the Arbitration Agreement is fatally ambiguous because the Arbitration Agreement states that it will be enforced pursuant to the FAA; however, the standard of review set forth in the EPRP differs from the FAA's standard. (*Petition* at 14-15). However, based on the totality of the provisions in the Arbitration Agreement, Petitioners' contention that the agreement is ambiguous or inconsistent is simply untenable.

A contract provision is ambiguous only where the terms are susceptible to differing reasonable interpretations. *See Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987). That is not the case here. As set forth above, the Arbitration Agreement expressly incorporated the EPRP by reference. The EPRP clearly provided the standard of review

for an appeal from an arbitration award. Thus, the only reasonable interpretation of the parties' agreement is that the standard of review set out in the EPRP supplemented the provisions of the FAA. Because there is only one reasonable interpretation, there is no ambiguity in the Arbitration Agreement, and the district court did not err in construing the parties' contract according to its terms.

B. The Arbitration Agreement is not unconscionable.

One of the questions Petitioners presented for consideration concerns whether it is unconscionable for an employer and employee to execute an arbitration agreement that contains a provision modifying a standard of review of the arbitration award. Although Petitioners fail to provide any briefing in support of this issue, they have framed their issues to characterize the Arbitration Agreement as an "adhesion contract." (*Petition* at i and 14). This issue does not call for a review by this Court.

Contracts of adhesions, wherein one party has minimal bargaining power, are not automatically void. *See Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) *cert. denied*, 506 U.S. 1079 (1993). To be voided, the contract must show that it is unconscionable. *See Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex. App.—San Antonio 1996, no writ) (holding that substantive aspect of unconscionability is the fairness of the agreement). In this case, there was nothing fundamentally unfair about the Arbitration Agreement that could benefit either party that chose to appeal an award. Even though the EPRP's supplemental standard of review benefited Raytheon in this instance, the standard was equally

available to the Petitioners. Thus, as the Fifth Circuit noted in its opinion, it was not unfair for the Arbitration Agreement to contain a standard of review that allowed the district court to assess the arbitrator's legal and factual conclusions. Because there is no unconscionability, the district court did not err in construing the parties' contract.

III. Petitioners are entitled to no remedy because the result would be the same without the contractually modified standard of review.

The Court should decline Petitioners' invitation to exercise its jurisdiction because, even if the district court had not reviewed the arbitrator's decision under the standard of review fashioned by the parties, the outcome would nonetheless be the same. In addition to the FAA's statutory grounds for vacating an award, a district court may set aside the decision of an arbitrator when the award reflects an arbitrator's "manifest disregard of the law." *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 761 (5th Cir. 1999). Although the district court did not conduct a "manifest disregard of the law" review, it had the discretion to do so and could have set aside the arbitrator's award based thereon.

As the Fifth Circuit noted in *Williams*, in addition to the statutory grounds for vacating an arbitration award, the FAA implicitly allows a district court to set aside an arbitrator's decision that is in "manifest disregard of the law." 197 F.3d at 762. If it is manifest to the district court that the arbitrator acted contrary to the applicable law, the award must be set aside if it results in significant injustice. *Id.* That is precisely the circumstance here.

To recover damages for intentional infliction of emotional distress, a plaintiff must prove that: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *See, e.g., Burden v. General Dynamics Corp.*, 60 F.3d 213, 218 (5th Cir. 1995). Texas law clearly takes a "strict approach to intentional infliction of emotional distress claims in the workplace." *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 612 (Tex. 1999). In order to properly manage its business affairs, employers must be able "to supervise, review, criticize, demote, transfer, and discipline employees." *Bruce*, 998 S.W.2d at 612 (citing *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.3d 31, 34 (5th Cir. 1992)). Courts have recognized that these events are unpleasant for employees and that emotional distress often results; however, "an employer must have latitude to exercise these rights in a permissible way. . . ." *Bruce*, 998 S.W.2d at 612. "Only in the most unusual of employment cases does the conduct move out of the realm of an ordinary employment dispute and into the classification of extreme and outrageous conduct." *Porterfield v. Galen Hospital Corp.*, 948 S.W. 2d 916, 920 (Tex. App.—San Antonio 1997, writ denied).

It is clear that state law does not provide for an award for intentional infliction of emotional distress based on facts such as these. All of the actions attributed to Raytheon were within the scope of supervising, reviewing, criticizing, and disciplining Cook. Both the district court and the Fifth Circuit recognized that Raytheon's returning Cook to her normal duties after her absence from work, when she was not restricted by her doctor, did not constitute "extreme or outrageous" conduct as a matter of law. *See Hughes Training,*

Inc., 254 F.3d at 594-95; *Hughes Training, Inc.*, 148 F. Supp.2d at 744-45. By holding contrary to established principles of law, the arbitrator's ruling was in manifest disregard of the law and resulted in a significant injustice to Raytheon. Accordingly, the district court was well within its authority to vacate the award.

CONCLUSION

As a matter of contract, Petitioners and Respondents were free to structure their arbitration agreement as they saw fit. The district court and the court of appeals correctly deferred to the parties' stated intentions and, as a result, their opinions were dictated by the FAA and precedent from this Court. Moreover, despite Petitioners' contention to the contrary, there simply is no conflict among the circuits ripe for review. For these reasons, Respondents respectfully request the Court deny the petition for writ of certiorari.

Respectfully submitted,

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